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In the Supreme Court of the United States

JAIME CASTILLO, BRAD EUGENE BRANCH, RENOS LENNY AVRAAM, GRAEME LEONARD CRADDOCK, KEVIN A. WHITECLIFF,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I. THE TEXT AND STRUCTURE OF § 924(c) AND THE STATUTORY SCHEME INDICATE THAT FIREARM TYPES ARE ELEMENTS

Respondent's bare assertion that § 924(c) defines only a "single offense" of using or carrying a firearm (US Br. 20) is not supported by the text or structure of § 924(c). In a single sentence, § 924(c) lists a total of six weapons, from "firearm" to "[firearm] equipped with a firearm silencer or firearm muffler," each of which is defined in § 921(a). No basis exists to characterize the term "firearm" as "the central element." US Br. 21. *See Richardson v. United States*, 526 U.S. 813, 119 S.Ct. 1707, 1711 (1999) ("emphasizing the first two words in the passage does not eliminate the last").[1]

Section 924(c) was drafted in a concise, understandable manner to express a lower-level offense and two aggravated offenses. The first clause, consisting of 83 words beginning with "whoever" and ending with "five years," sets forth elements describing the prohibited conduct and federal jurisdictional nexus (in 60 words) and the punishment (in 23 words). By using the terms "and if the firearm is a . . ." followed by specified firearm types,[2] the two levels of

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[1] The Sixth and Ninth Circuits have held that firearm type is a jury issue, while the Fifth and Eleventh have held that it is not. The First Circuit has held both ways. Two other circuits stated in dictum that firearm type is not a jury issue, but the jury in each found firearm type. *Compare* Pet. Br. 20-24 *with* US Br. 20 n.12.

[2] The term "is" refers to the nature of the firearm at the time of the offense. *See* § 922(g)(2) (prohibition on firearm receipt by a person "who

aggravated offenses need not redundantly repeat twice more the 60 words describing the other elements of the offense. Since all of the other elements are incorporated by reference, the two "and if" clauses need specify only the aggravated firearm types (in just 10 and 21 words respectively).[3]

Even though the only variations would be the firearm type and number of years imprisonment, respondent insists that, if the firearm types are elements, all other portions of the entire first clause must be repeated. To redraft the provision so that the entire first clause appears three times with only these variations, 266 words would be required rather than the 124 words in the actual version. Tedious repetition and prolixity would take the place of economy of words and simplicity.

Respondent asserts that the phrase "if the firearm is a machinegun" is in the passive voice and is thus somehow a sentencing factor. US Br. 22. Aside from the fact that this phrase is in the active voice, the distinction makes no difference as to meaning, for "active sentences can generally be made passive." Sidney Greenbaum, *The Oxford English Grammar* 57 (1996).

Respondent's novel canons of construction ignore § 924(j), which is structurally identical to § 924(c):

> A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall–
>
> (1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life . . . .

Since "if the killing is a murder" is equivalent to "if the firearm is a machinegun," respondent must conclude that murder is a sentencing factor. Not surprisingly, the courts have held that murder is an offense element.[4]

Disregarding § 924(c)'s structural identity with the carjacking law in *Jones v. United States*, 526 U.S. 227 (1999), respondent argues that, unlike § 2119's injury and death elements, § 924(c) does not introduce "any new factor, not already embodied in the basic definition of the offense." US Br. 22. Yet the lowest level offense in § 2119 is taking a vehicle "by force and violence or by intimidation," which often leads to injury or death. Further, while § 921(a)(3)(A) defines "firearm" as a weapon which will "expel a projectile by the action of an explosive," "machinegun" introduces the "new factor" of being a weapon which shoots "automatically more than one shot" by a single trigger pull. Whether the subject is "bodily injury" or a "machinegun," each requires additional proof and imposes a sentence over the statutory maximum for the lowest offense.

While § 924(c) distinguishes between different levels of seriousness (US Br. 23), the same could be said about the punishments for murder and manslaughter. Aggravated offenses are separate crimes with enhanced penalties.

Section 924(c) includes a recidivist provision, recidivism may be a sentencing factor, and thus, it is argued, firearm type

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is a fugitive from justice").

[3] Similarly, the second and third penalty clauses drop most of the verbiage of the first (23 words) and simply provide "to imprisonment for ten [or thirty] years" (5 words).

[4] *United States v. Pearson*, 203 F.3d 1243, 1269-70 (10th Cir. 2000) (jury must find murder in course of § 924(c) violation); *United States v. Harris*, 66 F. Supp. 2d 1017, 1033 (N.D. Iowa 1999) (distinguishing *Jones v. United States*, 526 U.S. 227 (1999) in that indictment "specifically alleges murder").

is a sentencing factor. US Br. 23-24. The same guilt-by-association argument could be made to read the carrying of a "firearm" as a sentencing factor. All weapons listed in § 924(c)–whether "firearm" or "machinegun"–are either elements or sentencing factors; they cannot be a mixture of both.

Further, respondent's premise is invalid, in that the Gun Control Act's provisions on recidivism are offense elements, not sentencing factors. The Act, P.L. 90-618, 82 Stat. 1213 (1968), enacted both § 924(c) and § 922(g), which makes it unlawful for a person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to receive a firearm with a nexus to interstate or foreign commerce. This "prohibits possession of a firearm by anyone with a prior felony conviction . . . ." *Old Chief v. United States*, 519 U.S. 172, 174 (1997). "Congress chose to make a defendant's prior criminal conviction one of the two elements of the § 922(g)(1) offense." *Id.* at 201 (O'Connor, J., dissenting).[5]

§ 924(c)'s recidivism provision as well as the specified firearm types are offense elements. *Almendarez-Torres v. United States*, 523 U.S. 224, 262 & n.3 (1998) (Scalia, J., dissenting).[6] Yet even if recidivism is not an element, firearm type undoubtedly is.[7]

[5] Similarly, Title VII of the Omnibus Crime Control and Safe Streets Act, P.L. 90-351, 82 Stat. 197 (1968), provided that "any person who–(1) has been convicted . . . of a felony" and who possesses a firearm in commerce "shall be punished" with two years imprisonment. 18 U.S.C. App. § 1202(a) (repealed 1986). Respondent implies that mention of the sentence in the same section as the crime makes the "crime" a sentencing factor, but "Title VII's substantive prohibitions and penalties are both enumerated in § 1202 . . . ." *United States v. Batchelder*, 442 U.S. 114, 119 (1979). "Congress does not create criminal offenses having no sentencing component." *Ball v. United States*, 470 U.S. 856, 861 (1985).

It is a jury function to find whether a firearm was "used." *Bailey v. United States*, 516 U.S. 137, 148 (1995). In some cases (excluding destructive devices and silencers), a jury may find that a firearm was used without finding its type. US Br. 25. Yet many cases involve a conventional firearm (such as a revolver) and a machinegun or other specified type, and the question arises as to which was actively employed. In such cases, inherent in the jury function may be what type of firearm was used.[8] *See Richardson*, 119 S.Ct. at 1709 ("unanimity in respect to each individual violation is necessary").[9]

[6] In *Deal v. United States*, 508 U.S. 129 (1993), six separate § 924(c) offenses were alleged in the same indictment, and the jury findings of guilt resulted in second or subsequent convictions. By alleging two or more § 924(c) counts, an indictment would on its face allege recidivism.

[7] Recidivism is a special case as a sentencing factor: "commission of a prior crime will lead to an enhanced punishment only when a relevant factfinder, judge, or jury has found that the defendant committed that specific individual prior crime." *Richardson*, 119 S. Ct. at 1712.

[8] It cannot be said that *the jury* found that "Castillo and Craddock carried grenades on April 19." US Br. 25 n.15. Instead, the jury convicted them of carrying firearms on February 28 (and acquitted them of the only conspiracy count). Nor did *the jury* find that "Branch and Avraam personally used machineguns" on February 28.

[9] The jury need not always decide unanimously "which of several possible means the defendant used to commit an element of the crime." *Id.* at 1710. *United States v. Correa-Ventura*, 6 F.3d 1070, 1087 (5th Cir. 1993), held that the jury need not decide which of several conventional firearms were used or carried. However, "verdict specificity may be required for some violations," i.e., where "the firearms proven fall within

Decisions holding firearm type to be an element are cognizant of this problem,[10] while decisions holding firearm type to be a sentencing factor seem oblivious that the jury may have found only that a conventional firearm was "used," yet the defendant may be sentenced for use of a machinegun.[11]

Section 921(a)(3)(B), (C), and (D) define "firearm" respectively as a firearm frame or receiver, a firearm muffler or silencer, and a destructive device. It never occurred to the district court to instruct the jury as to the definitions of these terms in connection with the § 924(c) count, and the jury thus

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different classes of Section 924(c)'s proscribed weapons." *Id.* at 1087 & n.35. *Accord, United States v. Morin*, 33 F.3d 1351, 1354 (11th Cir. 1994).

[10] *United States v. Sims*, 975 F.2d 1225, 1230-31, 1237-38 (6th Cir. 1992), *cert. denied*, 507 U.S. 932 (1993) (firearm in one car, machinegun in another car; remand to resolve sufficiency of evidence and *Pinkerton* liability for the machinegun); *United States v. Martinez*, 967 F.2d 1343, 1346 (1992) (firearm on floor, unloaded machinegun under mattress), *later proceeding*, 7 F.3d 146, 149 (9th Cir. 1993) (pre-*Bailey* reversal of district court dismissal of machinegun count because "the pistol had a closer relationship to the predicate offense than did the machine gun"); *United States v. Melvin*, 27 F.3d 710, 715 (1st Cir. 1994) (handgun accessible between front seats, machinegun stored in back of van; "the jury reasonably could have focused on the handgun" in finding "use"); *United States v. Alerta*, 96 F.3d 1230, 1234-35 (9th Cir. 1996) (jury possibly found that defendant only used "weapons that were not machine guns").

[11] *United States v. Shea*, 150 F.3d 44, 47 (1st Cir. 1998), *cert. denied*, 525 U.S. 1030 (1998) ("revolver tucked in his [defendant's] pants," semiautomatic assault weapon "in the rear seat"); *United States v. Alborola-Rodriguez*, 153 F.3d 1269, 1271 (11th Cir. 1998), *cert. denied*, 525 U.S. 1030 (1999) ("jury rendered only a general verdict without specifying which weapon or weapons [a pistol, rifle, and short-barreled shotgun] they unanimously found [defendant] to have used or carried").

could not have found that defendants used "firearms" under those definitions.[12] The court read the definition of "firearm" in § 921(a)(3), but only subparagraph (A) actually describes the object in question–a weapon that expels a projectile. J.A. 30. Only after the jury acquitted defendants of murder did the prosecution suggest that defendants could be sentenced for machineguns and destructive devices. Sentencing Mem., Docket No. 1304, filed June 10, 1994.

In sum, the text and structure of § 924(c) as well as the statutory scheme make clear that firearm types are offense elements.[13]

II. FIREARM TYPES ARE TRADITIONAL OFFENSE ELEMENTS

In both federal and State law, a firearm type is traditionally an element of the offense. Respondent's discussion simply ignores the obvious.

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[12] The jury could not guess that § 921(a)(4) defines "destructive device," *inter alia*, as a "rocket having a propellant charge of more than four ounces" or a weapon (other than a shotgun) "with a bore of more than one-half inch."

[13] As to the finding that petitioners are vicariously liable for machinegun use by unknown co-conspirators, respondent fails to vindicate the radical transformation of *Pinkerton v. United States*, 328 U.S. 640 (1946), from the doctrine that the jury may find co-conspirator liability to a doctrine that *the sentencing court* may make such finding. US Br. 25-26 n.15. Nor may sentences for the 5-year "firearm" offense here be enhanced under the Sentencing Guidelines. "Unless otherwise specified," a base offense level and adjustments are applied to joint criminal activity. USSG § 1B1.3(A)(1)(B). This is an "otherwise specified" case in that, for § 924(c), "the term of imprisonment is that required by statute." § 2K2.4.

In every other provision of Title I of the Gun Control Act which mentions a specific firearm type–including machinegun, destructive device, short-barreled rifle or shotgun, and semiautomatic assault weapon–the firearm type is an element. The response that these provisions may not be "structurally similar" to § 924(c), US Br. 29, ignores the fact that Congress consistently treats these firearm types as elements.

The National Firearms Act, Title II of the Gun Control Act, prohibits various acts involving a "firearm," 26 U.S.C. § 5861, and defines "firearm" to include a machinegun, destructive device, and a short-barreled shotgun or rifle. § 5845. The fact that Titles I and II define "firearm" differently (US Br. 29-30) is irrelevant. "Machinegun" is defined the same. 18 U.S.C. § 921(a)(23) (incorporating 26 U.S.C. § 5845(b)).[14] Under both titles, firearm type is an offense element and every portion of the applicable definition must be satisfied for a conviction.[15] Respondent has not suggested why Congress would depart from this tradition in § 924(c).

"Destructive device" includes a combination of parts "*intended* for use in converting any device into a destructive

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[14] Contrary to US Br. 21 n.13, "firearm" as defined in § 921(a)(3) does not include the definition of "machinegun" as "any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun." 26 U.S.C. § 5845(b)). Section 924(c) applies to a machinegun only if it is a "firearm," which does not include such conversion parts.

[15] *E.g.*, *United States v. Spinner*, 152 F.3d 950 (D.C. Cir. 1998) (reversing assault weapon conviction for lack of evidence that rifle had "action" under which pistol grip protruded conspicuously); *United States v. Meadows*, 91 F.3d 851 (7th Cir. 1996) (reversing conviction for short-barreled rifle for lack of evidence that it had a "rifled bore").

device" and from which such device may be readily assembled, and excludes "a rifle which the owner *intends* to use solely for sporting" purposes. 18 U.S.C. § 921(a)(4); 26 U.S.C. § 5845(f). "However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury." *Morissette v. United States*, 342 U.S. 246, 274 (1952) (citation omitted).[16]

The States overwhelmingly make specific firearm types offense elements. With roots in the common law and the early Republic,[17] numerous States make it a crime to use machineguns, short-barreled guns, and other specified firearms in violent crimes. Pet. Br. 26-30 & App. Further, virtually all States either prohibit mere possession or unregistered possession of machineguns and short-barreled guns, which are invariably offense elements.[18] State law in this respect is hardly

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[16] In *Apprendi v. New Jersey*, No. 99-478 (argued Mar. 28, 2000), the State argues that traditionally "motive" is a sentencing factor while "intent" is an element. Br. for State of N.J., 12, 29-38. *Accord*, Br. for U.S. as Amicus Curiae, 14.

[17] Since passage of the first prohibition on carrying concealed weapons, *see Bliss v. Commonwealth*, 2 Litt. (Ky.) 90 (1822) ("pocket pistol, dirk, large knife, or sword in a cane"), the States typically have made specific weapons as offense elements in laws concerning the carrying or possession of firearms. For State-by-State summaries, *see* "Appendix A, State Firearms Laws," in Halbrook, *Firearms Law Deskbook* (1999 ed.).

[18] *E.g.*, N.J. Stat. Ann. § 2C:39-3; Va. Code § 18.2-290, 291. State laws concerning mere possession of such firearms (excluding laws on the carrying or misuse thereof) may be found in Dep't. of Treasury, Bureau of Alcohol, Tobacco & Firearms, *State Laws & Published*

"inconclusive." US Br. 27.

Sentencing judges consider "the instrumentality used in committing a violent felony," *McMillan v. Pennsylvania*, 477 U.S. 79, 89 (1986), but as sentencing judges consider facts that are elements as well as facts that are not elements, this does not assist respondent. *McMillan* upheld 42 Pa.C.S.A. § 9712(a), which provides that a person convicted of a violent crime, "if the person visibly possessed a firearm" or a replica thereof–which an eye witness can easily identify, unlike specific firearm designs with technical, often-contested definitions–shall be sentenced to a "minimum sentence" of five years imprisonment. Subsec. (b) explicitly provides that this provision is not "an element of the crime" and that the court decides the issue "by a preponderance of the evidence."[19]

A single provision of New Jersey law provides the sole instance in which a sentencing judge may find a firearm or machinegun and may increase the maximum punishment. US Br. 28 n.17. A preceding section provides, similar to *McMillan*, minimum terms if the court finds use of a firearm, machine gun, or assault firearm in a violent crime, and, as in *Almendarez-Torres*, an increased maximum term for recidivism.[20] In the next section, an "extended term" (increase in the maximum sentence)

Ordinances–Firearms, ATF P 5300.5 (1998).

[19] *See* N.C. Gen. Stats. § 15A-1340.16A ("the court shall increase the minimum term of imprisonment" of a person convicted of certain felonies if "the court finds" that he used or displayed a firearm).

[20] N.J. Stat. Ann. § 2C:43-6.c ("minimum term" for use of "firearm" in violent crime, "mandatory extended term" if previous firearm conviction); § 2C:43-6.g ("minimum term" for a "machine gun or assault firearm"); § 2C:43-6.d, .h (preponderance-of-evidence standard).

is imposed on a recidivist who the court determines under the above provisions used a firearm, and a higher extended term if the recidivist used a machine gun or assault firearm. N.J. Stat. Ann. § 2C:43-7.c, .d. This is the only known provision in the laws of all 50 States which raises the maximum term for a person (a recidivist) found by the court to have used such weapons.[21] Unlike § 924(c), it is explicitly drafted as a sentencing factor.

In sum, federal and State law consistently makes firearm type an offense element. Out of the entire body of federal and State law, respondent has cited only a single provision of New Jersey law which parallels its preferred construction of § 924(c).

III. THE LEGISLATIVE HISTORY TREATS ALL LISTED FIREARMS AS ELEMENTS

Respondent ignores this Court's jurisprudence which cautions against resort to legislative history to construe a criminal statute against a defendant. Pet. Br. 39-43. Instead,

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[21] Petitioners were unaware of and did not include this provision in their summary of State law. *See* Pet. Br., App. Also, petitioners incorrectly listed Nevada as a State in which the judge may enhance a sentence based on weapon type. *See Stroup v. State*, 874 P.2d 769, 771 (Nev. 1994) ("NRS 193.165 requires the jury to find the use of a deadly weapon before the defendant's sentence may be enhanced"). Reflecting these corrections, 16 States have no separate statute punishing use of a firearm in a felony, 20 States and D.C. make use of a firearm a separate offense, and 15 States make use of a machinegun and other specified firearm types a separate offense. Three States (New Jersey, Pennsylvania, and North Carolina) make firearm use a sentencing factor, but only New Jersey authorizes an increase in the maximum punishment based on the court's determination of the firearm type.

respondent strings together snippets from the legislative history which do not support its tortured reading of the statute. The result suffers from two fundamental defects. First, in floor debates, the term "mandatory sentences"[22] was consistently applied to the term "firearm" as well as "machinegun." *See* US Br. 35-37. Rep. Harold Volkmer, author of the 1986 enactment, explained that his substitute "includes stiff mandatory sentences for the use of firearms, including machineguns . . . ." 132 Cong. Rec. H1652 (Apr. 9, 1986). Since "firearm" is incontestably an element, references to sentencing do not alter the status of a "machinegun" as an element.[23]

Second, respondent simply ignores references which suggest that firearm types are offense elements. It disregards that H.Rpt. 99-495, 99th Cong., 2d Sess., 2, 10 (1986), not only proposed "a mandatory prison term of ten years for using or carrying a machine gun" but also stated that § 924(c) "is in reality a separate offense." Respondent also overlooks that the Department of Justice supported the 1990 amendment adding short-barreled guns and destructive devices to § 924(c) in an analysis which simultaneously stated that "924(c) is a separate

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[22] In the legislative history, the term "mandatory sentences" was almost invariably used. Pet. Br. 46-48. "Enhanced Penalties" was used once when the penalty for machinegun use was raised from 10 to 30 years. US Br. 38 n.23. Respondent uses the term "enhanced sentence" (Br. 33, 35), but this was not used in the legislative history.

[23] Indeed, in 1968 Rep. Poff introduced § 924(c), which had "firearm" as the only weapon element, with the comment: "The effect of a minimum mandatory sentence in this case is to persuade the man who is tempted to commit a Federal felony to leave his gun at home." 114 Cong. Rec. 22231 (July 19, 1968).

offense, which must be indicted and proved at trial, rather than merely a penalty enhancement." 136 Cong. Rec. S9080 (June 28, 1990).

Respondent acknowledges H.Rpt. 103-489, at 23 (1994), in 1994 U.S.C.C.A.N. 1820, 1831, which states that the 1994 amendment "adds use of a semiautomatic assault weapon to the crimes covered by the mandatory minimum of 5 [*sic*] years." Yet respondent seems oblivious to the significance of this characterization that semiautomatic assault weapons were being added to the "crimes" set forth in § 924(c).[24]

IV. THE DOCTRINES OF CONSTITUTIONAL DOUBT AND LENITY REQUIRE CONSTRUCTION OF FIREARM TYPES AS OFFENSE ELEMENTS

Respondent suggests that the rule of lenity cannot apply to whether a provision is an element or a sentencing factor. US Br. 43 n.26. *Simpson v. United States*, 435 U.S. 6, 15 (1978), clearly precludes such an argument: "This policy of lenity means that the Court will not interpret a federal criminal statute so as *to increase the penalty* that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." (Emphasis added.)

Respondent attempts to avoid the doctrine of

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[24] Respondent argues that the 1998 amendments to § 924(c) treat firearm types as sentencing factors. US Br. 39-41. To the contrary, the addition of numbered subparagraphs makes the new version appear even more like the statute in *Jones*. In any event, "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress." *Jones*, 526 U.S. at 323. "These later-enacted laws, however, are beside the point. They do not declare the meaning of earlier law." *Almendarez-Torres*, 523 U.S. at 237.

constitutional doubt by blithely asserting that its construction of § 924(c) is so clear as to admit of no doubt. US Br. 43. This both begs the question and ignores the obvious. The Fifth Circuit explicitly recognized in the opinion below that the text of §924(c) "forecloses neither of these two competing readings of the statute." Pet. App. 81a. Every court to consider the issue before that decision held firearm types to be offense elements. Pet. Br. 20-24. Until this case, that was apparently the position of the Department of Justice.[25]

Respondent entreats this Court not to reach the constitutional issue because petitioners invoke the doctrine of constitutional doubt without attacking the constitutionality of the statute. US Br. 43-44. Yet arguing unconstitutionality disserves the judiciary where, as here, the statute can easily be saved with or without reliance on the doctrine of constitutional doubt.

A "crime" cannot be construed as a "sentencing factor" so as to undercut the requirement that "the trial of all crimes . . . shall be by jury," U.S. Const. art. III, § 2, ¶ 3, or the right "in all criminal prosecutions" to trial by a jury of the State and district where the "crime" was committed. *Id.* amend. VI. Despite the term "crime" being part of the Constitution's vocabulary, respondent views "crime" as anything the legislature or a court says it is (or is not).[26] When what is really a "crime"

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[25] "*All parties* concede that the jury mistakenly was not asked to identify which of the six firearms at issue in this case–ranging from machine guns to handguns–underlay its guilty verdict . . . ." *United States v. Melvin*, 27 F.3d at 711.

[26] Notes *TVA v. Hill*, 437 U.S. 153, 173 n.18 (1978):

> This recalls Lewis Carroll's classic advice on the construction of language: "'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean–neither more nor less.'"

is declared by the legislature or construed by the judiciary to be a sentencing factor, the power of the grand jury to accuse (or not accuse) a person of crime[27] and of the petit jury to try the person is shifted to the judiciary.[28] Yet juries are just as much constitutional decision makers, within their spheres, as are the other branches of government. One body cannot usurp the jury power by word smithing.[29] William Blackstone, *Commentaries* *380, explained:

> But in settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in . . . . Here therefore a competent number of sensible and upright jurymen . . . will be found the best investigators of truth, and the

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[27] "The grand jury performs most important public functions; and, is a great security to the citizens against vindictive prosecutions . . . ." Joseph Story, *A Familiar Exposition of the Constitution of the United States* §390 (1840).

[28] John Marshall noted at the Virginia ratification convention in 1788:

> What is the object of a jury trial? To inform the court of the facts. . . . I hope that in this country, where impartiality is so much admired, the laws will direct facts to be ascertained by a jury.

III Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 557-58 (1836).

[29] *See* Benjamin J. Priester, *Sentenced for a "Crime" the Government Did Not Prove*, 61 LAW & CONTEMP. PROBS. 249 (Autumn 1998); Note, *Awaiting the Mikado: Limiting Legislative Discretion to Define Criminal Elements and Sentencing Factors*, 112 HARV. L. REV. 1349 (April 1999).

surest guardians of public justice. . . . *This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice* . . . . (Emphasis added.)

Even if this Court concludes that constitutional doubt exists about treating firearm types as sentencing factors, argues respondent, the judgment should be affirmed. US Br. 44-46. Respondent suggests an affirmance in *Apprendi* will require an affirmance here, despite the fact that the Fifth Amendment's indictment clause applies to federal, but not State, prosecutions. US Br. 45-46 n.27. Further, the statutory structure in *Apprendi* is vastly different than that here, and its subject is argued to be motive or purpose, not the traditional elements found here. This case is clearly encompassed within the *Jones* rule.

Lastly, respondent is plainly wrong to suggest that even if petitioners' 30-year sentences "resulted from constitutionally insufficient procedures," this Court should remand the case to the Fifth Circuit to consider if the error was "harmless." US Br. 46. As *Jones* makes clear, it cannot be harmless error to sentence petitioners to imprisonment for crimes for which they were not indicted and for which a jury did not convict them beyond a reasonable doubt.[30] Contrary to respondent's cavalier approach to the Fifth and Sixth Amendments, this clearly would "affect substantial rights" and "the fairness, integrity or public reputation of judicial proceedings." US Br. 46 n.28. Section

[30] *See United States v. Alerta*, 96 F.3d at 1235-36 (despite strong evidence of machinegun use, it was not "harmless error" to fail to instruct the jury of machinegun element). What matters is not what is in the record, "but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." *Id.* at 1236, quoting *Carella v. California*, 491 U.S. 263, 269 (1989) (Scalia, J., concurring).

924(c) can and should be interpreted to avoid such a travesty.

V. RESPONDENT'S STATEMENT OF FACTS IS INACCURATE AND INCOMPLETE

While this case involves purely legal issues, respondent's rendition of the facts contains inaccuracies and is incomplete. Inasmuch as this Court includes a statement of facts in its opinions, petitioners offer the following to place the events in context. In doing so, petitioners are fully aware that the sufficiency of the evidence is not at issue in this forum, nor do they seek to belittle the tragedy that befell *any* of the persons killed or wounded during the fateful events here.

At the outset, one cannot be blind to the evidence that led the trial court to instruct the jury:

> If you determine that the ATF agents caused the Defendant under consideration to reasonably and honestly believe that he or another was about to be killed or receive serious bodily harm due to the agents' purported use of excessive or unreasonable force against his or her person, then self-defense would be appropriate if all of the above elements are met.

Record on Appeal, No. 94-50437, Vol. 23, 1225-26. The jury acquitted petitioners of murder. (This instruction was not given for the lesser-included offense of aiding and abetting manslaughter.)

Judge Schwarzer wrote in his dissenting opinion below: "While there is conflicting evidence as to whether the first shot came from within the compound or outside the compound, no evidence identifies any of the individual defendants as firing the first shot." Pet. App. 104a. *See id.* at 105-07a & n.5 (detailing evidence that "agents fired indiscriminately through the windows

and walls of rooms from which no gunfire originated").

It was not "the Davidians"–115 children, women, and men–who "fortified" Mt. Carmel in anticipation of a "violent confrontation." US Br. 3. David Koresh and a small circle, which included none of the petitioners, accumulated numerous weapons to which the residents had no access. Tr. 4596-97, 4610 (testimony of prosecution witness Kathryn Schroeder). Not one shred of evidence suggests that petitioners were involved in converting rifles into machineguns.

On April 19, the FBI assaulted the buildings with tanks, firing gas and knocking down roofs and walls. Tr. 5066-71. Many residents died from carbon-monoxide poisoning from the fire or from gunshot wounds, but several women and children were killed by suffocation or blunt post-traumatic injury due to the collapse of ceilings and walls. Tr. 5963-64, 5979, 5988.

Respondent's account of petitioner Castillo's actions on February 28 (US Br. 5-6) ignores that Castillo unsuccessfully tried to chamber a round in his rifle only *after* "gunfire erupted through the [front] door." He then ran to his room, picked up a handgun, saw co-resident "'Winston' laying on the floor dead with a gunshot wound to the head," and took cover. Pet. App. 47-48a. It is "undisputed" that "Castillo took cover during the gun battle and never fired a shot." Pet. App. 103a n.3 (Schwarzer, J., dissenting).

It is pure speculation to assert that Castillo possessed a hand grenade when he escaped from the fire on April 19. US Br. 6. The pages of the transcript cited by respondent fail to establish this allegation. *See* Castillo Reply Br. in court of appeals, No. 97-50708, at 10-12.

Respondent understandably omits reference to the trial court's unfounded assertion that respondent Branch fired an automatic weapon on February 28 because he wore civilian

clothes and an agent saw someone in a window in civilian clothes firing what appeared to be an automatic weapon. Pet. App. 167a. In a building with 69 adults, this conclusion was utter speculation.

Prosecution witness Victorine Hollinsworth testified that she and other women and children took cover on a hallway floor, that shots were being fired "from outside," and that Branch reported that co-residents had been killed and wounded. Tr. 4097-98. She believed Branch was protecting them, some of whom would have otherwise been killed. Tr. 4152-53, 4173. Prosecution witness Marjorie Thomas testified that Branch "was protecting us." Video Tr. 37. Thomas did *not* testify that she overheard Branch say he shot someone. *Id.* at 48-51. *See also* Branch Br. in court of appeals, No. 94-50437, at 18-22.

The district court found that "there is no direct evidence that [petitioner] Whitecliff personally used or carried an enhancing weapon." Pet. App. 168a. Schroeder testified that Whitecliff said he shot at the helicopters on February 28. US Br. 7. The helicopters were "combat-equipped aircraft." Tr. 3205. Judge Schwarzer paraphrased some of Marjorie Thomas' testimony (Pet. App. 106-07a n.5) as follows:

> [She] saw three helicopters approaching. . . . Then bullets began coming through the window, shattering the blinds. ([Video] Tr. 30-31.) . . . She testified that when she saw the helicopter and heard the shots, she thought they were all in danger of being killed. (Tr. 87-88.) . . . Bullets were flying everywhere and they feared for their lives. (Tr. 116-19.)[31]

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[31] Inspecting the premises after the raid, Attorney Jack Zimmerman identified bullet holes in the roof which "came from the sky downward" and exited through the ceiling into the inside of the building.

Respondent's statements about petitioner Avraam (US Br. 8) are not supported by the record. Schroeder testified that Avraam told her that he fired a firearm on February 28, but then admitted that she only assumed he did so. Tr. 4517, 4655. Jailhouse cell mate Rogans testified that Avraam said he did not fire a shot, he hid behind a safe, and he was afraid for his life. Tr. 6086-87, 6846-6850, 6098. Rogans also testified that Avraam said that *before* the date of the raid–not *on* the date of the raid–he had an automatic weapon. Tr. 6088-6089.

On February 28 petitioner Craddock had a rifle and a handgun, "but Koresh told him to stay in his room." US Br. 8-9. When the shooting started, Craddock "laid down on the floor of the room and stayed there" and "he did not fire." Tr. 6350.

Judge Schwarzer wrote: "There is no evidence that any of them [the defendants] entered into an agreement to kill federal officers, much less that any did so with premeditation and malice aforethought." Pet. App. 116a. This Court should consider the facts concerning each defendant and reject respondent's general allegations about "the Davidians."

CONCLUSION

This Court should reverse the judgment, vacate petitioners' sentences on the § 924(c) count, and remand for resentencing to no more than five-years imprisonment.

Tr. 6610-11, 6646.

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